

DEPARTMENT OF CORRECTIONS AND REHABILITATION
DIVISION OF JUVENILE JUSTICE
Title 15, California Code of Regulations
Sections 4034.0, 4034.1, 4034.2, 4034.3, 4034.4, 4036.0 and 4040.0
Use of Force
INITIAL STATEMENT OF REASONS/
POLICY STATEMENT OVERVIEW

Description of Public Problem, Administration Requirement, or Other Condition or Circumstance the Regulation Intended to Address

Section 1004 of the Welfare and Institutions (W & I) Code establishes that the Division of Juvenile justice (DJJ) shall have charge of the persons committed to or confined in DDJ institutions and shall provide for their care, supervision, education, training, employment, discipline, and government. The DJJ shall exercise its powers toward the correction of their faults, the development of their characters, and the promotion of their welfare.

The W & I Code, Section 1712 assigns responsibility to the California Department of Corrections and Rehabilitation, DJJ to make and enforce all rules appropriate to the proper accomplishment of the functions of the DJJ.

In November 2004, the Superior Court of California in *Farrell v. Allen* (now Tilton), County of Alameda, Case No. RG 03079344, issued orders in a Consent Decree under which the DJJ agreed to develop and implement a comprehensive remedial plan that would reduce violence and the need for the use of force within the DJJ. The Consent Decree required the DJJ to implement, by December 15, 2004, new policies and procedures to eliminate use of room extractions and chemical agents.

Current DJJ regulations pertaining to the use of force do not sufficiently provide employees with clear guidelines and are not consistent with policies the DJJ has implemented in an effort to comply with the court order specified in the *Farrell v. Allen* Consent Decree.

These regulatory amendments are intended to realign the regulations with policies the DJJ has implemented in order to comply with the Courts' orders.

Specific Purpose and Factual Basis

Existing Section 4040.0, Article 3, Title 15 of the California Code of Regulations (CCR) pertains to the use of restraining devices on youths for security purposes in parole and institutional operations. Subsection (b) states that only reasonable and

necessary force shall be used but does not define what is meant by “reasonable” or “necessary”. Therefore, the DJJ believes Section 4040.0 should be repealed and proposes to adopt new regulations that are consistent with the orders issued by the court.

Section 298.1 (c) (1) (A) of the Penal Code defines the term “use of reasonable force” as the force that an objective, trained and competent correctional employee, faced with similar facts and circumstances, would consider necessary and reasonable to gain compliance. Although Section 298.1 pertains to the refusal or failure to give a blood specimen, saliva sample, or thumb or palm print impression which are mandated by law, the DJJ believes this is a standard definition used throughout law enforcement as well as the Commission on Peace Officer Standards and Training and proposes to adopt the definition as a standard definition that shall apply to the use of force under all circumstances.

The proposed regulations are intended to specify and identify the circumstances as well as the amount of force that an objective, trained, and competent Correctional Peace Officer, faced with similar facts and circumstances, would consider necessary and reasonable, as prescribed by the Commission on Peace Officer Standards and Training, to subdue an attacker, overcome resistance, effect custody, or gain compliance with a lawful order. The proposed regulations are also intended to establish supervision, monitoring, and evaluation of force deployment.

The specific purpose of adopting Section 4034.0 is to establish a Use of Force Policy under which the DJJ shall operate. The proposed regulations specify force shall be used only when reasonably necessary to subdue an attacker, overcome resistance, effect custody, or to gain compliance with a lawful order. At no time shall any DJJ staff use force against a youth for punishment, retaliation, or discipline.

The specific purpose of adopting Section 4034.1 is to define the terms “reasonable force”, “unnecessary force”, “excessive force”, “non-deadly force”, “great bodily injury” and “deadly force” as they apply to force used by DJJ staff to subdue an attacker, overcome resistance, effect custody, or gain compliance with a lawful order.

The specific purpose of adopting Section 4034.2 is to establish “use of force options”, and the proper use thereof, available to DJJ staff. The proposed regulations define use of force options as the choices available to an employee when selecting a reasonable force option. The choices include but are not limited to: dialogue or verbal persuasion, chemical agents, physical strengths and holds, mechanical restraints, less-lethal weapons, and firearms. Employees may use reasonable force as required in the performance of their duties, but unnecessary or excessive force shall not be used. If staff, at any point, determines the situation can be resolved without any further use of force, staff shall terminate the use of

force. Section 1700 of the W & I Code establishes that community restoration, victim restoration, and offender training and treatment shall be substituted for retributive punishment and shall be directed toward the correction and rehabilitation of young persons who have committed public offenses. It shall be the policy of the DJJ to accomplish the educational, treatment and supervision functions with minimal reliance on the use of force.

The specific purpose of adopting Section 4034.3 is to establish a reporting and monitoring process pertaining to any force used by Correctional Peace Officers or witnessed by staff employed by the DJJ. The proposed regulations require an employee who uses or observes force greater than verbal persuasion to document the incident by preparing and submitting the appropriate forms to his or her on-duty supervisor. The proposed regulation also establishes an Institutional Force Review Committee and a Regional Parole Force Review Committee that shall be tasked with evaluating and monitoring all use-of-force incidents to determine their appropriateness. Non-substantive changes have been made to the regulation text in Section 4034.3 (a) (1) to reflect our recent organizational name change from California Youth Authority to DJJ since the submission and approval of the emergency filing of the Use of Force regulation text.

The purpose of adopting Section 4034.4 is to establish the use of mechanical restraints, and under what circumstances and how they shall or shall not be used. The proposed regulations permit the use of divisionally approved mechanical restraints under certain circumstances when used in a manner consistent with the manufacturer's instructions and DJJ policies and procedures.

The DJJ is also proposing to repeal existing Section 4036 pertaining to training requirements prior to the use of non-lethal chemical agents. Training of Correctional Peace Officers is accomplished through the Commission on Peace Officer Standards and Training. Use of chemical agents will be addressed through the regular rule making process at a later time.

The factual basis for the determination by the DJJ that this proposed action is necessary is as follows:

In December 2003, expert Barry Krisberg, Ph.D. issued a report on existing conditions within DJJ institutions pertaining to the physical safety of youths and the excessive use of force by DJJ staff. This review was completed at the request of the California Attorney General and the DJJ in response to federal and state court lawsuits filed by the Prison Law Office.

Mr. Krisberg's findings were as follows:

- Suspicions that DJJ staff engaged in the use of excessive force were found to be well grounded in a number of audits and investigations conducted by the Office of Inspector General.

- In the first four months of 2003, at the Herman G. Stark Youth Correctional Facility (HGSYCF) alone, chemical restraints were used 535 times, physical restraints were used 109 times and mechanical restraints were used 236 times. Pepper balls were used 10 times. At Fred C. Nelles Youth Correctional Facility (FCNYCF) there were 274 reports of use of force mostly involving chemical restraints. According to FCNYCF administrators, none of these situations involved “unnecessary or excessive” use of force. However, these terms are only generally defined in DJJ policies.
- Force is used by DJJ primarily in connection with stopping youth-on-youth fights and curtailing group disturbances. However, force is also used with extraction or removal of youths from secure areas, principally their rooms. These events often entail significant risks of injury to both staff and youths.
- Documented use of dangerous and potentially fatal high-powered weapons that delivered chemical agents. These chemical restraints were designed to be used by correctional staff to quell riots that broke out in prison yards, but DJJ staff were using these same powerful chemical agents during extraction of youths from their rooms and other secure areas. Since these powerful chemical agents absorbed the oxygen in the small youths rooms, there were real dangers that DJJ youths could be asphyxiated.
- Documented physical abuse where wards were made to spend long periods of time on their knees with their hands bound behind them in mechanical restraints. In some cases the wards were made to kneel on sharp surfaces that increased their discomfort. This practice was called “Gym TD” by staff. Other wards were made to strip down to their boxer shorts and were forced to sleep on cement slabs in very cold rooms. Some staff also struck the wards during these situations.
- There is no doubt the DJJ staff must aggressively intervene in situations in which ward safety is a major consideration. However, it is not clear that the secure area extractions are always warranted or if some lower level of force, including attempting a sustained conversation with the ward might not produce a better result with less risk to staff and wards. These secure area extractions are perceived by staff and wards as contests of will.
- The DJJ suffers from serious problems of violence in its institutions. The climate of violence has engendered high levels of fear among wards and staff that affect virtually all aspects of daily operations. These tensions produce an extensive use of force, especially chemical agents. Further, the DJJ staff mostly rely on a reactive response to the violence, involving the use of the Disciplinary Decision Making System (DDMS) and the resort to extensive use of restrictive programs and temporary lockdowns.

- There is considerable variability in reporting across the DJJ institutions concerning the use of force by staff. Each of the institutions used different categories for reporting either violent incidents or the use of force.

In November 2004, the Superior Court of California in *Farrell v. Allen* (now Tilton), County of Alameda, Case No. RG 03079344, issued orders in a Consent Decree as stated above.

In January 2005, the parties stipulated to extend the date for filing the Ward Safety and Welfare Remedial Plan until November 30, 2005. The parties agreed the DJJ had implemented interim measures to address some of the deficiencies identified in the December 2003 report prepared by the Consent Decree expert, Barry Krisberg, Ph.D., but still needed to take further specified “interim” actions pending completion of the remedial plan.

The Ward Safety and Welfare Remedial Plan was not fully memorialized in writing by the November 30, 2005 due date but was verbally presented to the plaintiff, the Special Master and expert Barry Krisberg, Ph.D. This included but was not limited to revising the existing Use of Force policy to:

- 1) Distinguish immediate uses of force to protect persons and prevent harm.
- 2) Add a centralized force review process.
- 3) Implement a contemporaneous use of force reporting process for all employee participants and witnesses.

In April 2006, Special Master Donna Brorby filed a report with the court regarding DJJ's compliance with the provisions of the Consent Decree and the January 31, 2005 Stipulation.

The Special Master reported little change in the DJJ's use of force incidents. The use of force remains pervasive in the DJJ. Though staff had been trained in a revised Use of Force Policy by November 2004, the new policy was still in the process of being finalized and promulgated.

The current DJJ regulations pertaining to the use of force do not sufficiently provide employees with clear guidelines and are not consistent with policies the DJJ has implemented in an effort to comply with the court order specified in the *Farrell v. Allen* Consent Decree and again in the January 31, 2005 Court Stipulation.

Providing clear guidelines to DJJ staff in the use of force is critical. Failure by the DJJ to make specific “use of force” regulations increases the risk of violence and will continue to result in serious injuries and/or even the death of youths, parolees, and/or staff.

Alternatives Considered

The DJJ must determine that no reasonable alternative considered by the DJJ, or that has otherwise been identified and brought to the attention of the DJJ, would be more effective in carrying out the purpose for which the actions are proposed or would be as effective and less burdensome to affected private persons than the proposed regulatory actions.

Alternatives That Would Lessen Any Adverse Economic Impact On Business

This proposed regulatory action applies only to Correctional Peace Officers employed by the DJJ and youth under the jurisdiction of the DJJ. Any impact on California business, including the ability of California businesses to compete with businesses in other states would be indirect and insignificant. The DJJ has not identified any alternatives that would lessen any adverse impact on businesses.

Documents Relied Upon

- December 2003 General Corrections Review of the California Youth Authority, Submitted by Barry Krisberg, Ph.D.
- November 2004 Superior Court of California, *Farrell v. Allen* (now Tilton), County of Alameda, Case No. RG 03079344, Consent Decree
- January 2005 Superior Court of California, *Farrell v. Allen* (now Tilton), County of Alameda, Case No. RG 03079344, Stipulation
- April 2006 Superior Court of California, *Farrell v. Allen* (now Tilton), County of Alameda, Case No. RG 03079344, First Report of Special Master Donna Brorby